No. 98-1186

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

DONNIE F. COLLUM,

Petitioner,

vs.

NEIL BURL CAIN, Warden
Louisiana State Penitentiary,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement of Facts	1
Reasons for Denying the Writ	4
I. Whether A Juvenile Can Knowingly And Intelligently Waive His Right To Counsel, And His Right Against Self-Incrimination, Is A Question Of Fact To Be Determined By A Review Of The "Totality Of Circumstances".	4
II. The Louisiana Supreme Court Decision Of *State Of Louisiana In The Interest Of Dino* Should Not Be Applied Retroactively. *Dino* Is No Longer The Law Of Louisiana.	6
III. Application Of Antiterrorism And Effective Death Penalty Act (AEDPA), 28 U.S.C.A. § 2253, *et seq.*, To Petitioner's Claims.	7
A. Application Of AEDPA To Petitioner's Claim Concerning Voluntary Nature Of Confession.	7
B. Application Of AEDPA To Petitioner's Claim Concerning Retroactivity Of *Dino*.	9
Conclusion	11

TABLE OF CITED AUTHORITIES

Page

Cases:

Carter v. Johnson, 110 F.3d 1098 (5th Cir. 1997) 8, 10

Drinkard v. Johnson, 97 F.3d 751 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1114 (1997), *overruled in part by Lindh v. Murphy*, 117 S. Ct. 2059 (1997) 9, 10

Griffith v. Kentucky, 479 U.S. 314 (1987) 9, 10

Johnson v. New Jersey, 384 U.S. 719, 86 S. Ct. 1772 (1966) 6

Mata v. Johnson, 99 F.3d 1261 (5th Cir. 1996), *vacated in part on other grounds*, 105 F.3d 209 (5th Cir. 1997) 10, 11

State v. Collum, 365 So. 2d 1272 (La. 1979), *writ denied*, *Collum v. Louisiana*, 444 U.S. 882 (1979) 5, 6, 8, 9

State v. Fernandez, 712 So. 2d 485 (La. 1998) 7

State of Louisiana in the Interest of Dino, 359 So. 2d 586 (La. 1978) 6, 7, 9

Teague v. Lane, 489 U.S. 288 (1989) 9, 10

Wilkerson v. Whitley, 28 F.3d 498 (5th Cir. 1994) ... 10

Cited Authorities

Page

Statutes:

28 U.S.C.A. § 2253, *et seq.* 7

28 U.S.C. § 2254(d) 7

28 U.S.C.A. § 2254(d)(1) 9

28 U.S.C. § 2254(e)(1) 9

The State of Louisiana, respondent herein, prays that this Honorable Court deny the issuance of a Writ of Certiorari to review the judgment and decision of the Supreme Court of the State of Louisiana and the United States Court of Appeals for the Fifth Circuit affirming the convictions and upholding the validity of the guilty pleas of Donnie Franklin Collum for four (4) counts of second degree murder in the Seventeenth Judicial District Court, Lafourche Parish, State of Louisiana and denying petitioner's motion for Certificate of Appealability.

STATEMENT OF FACTS

On May 27, 1977, Jessie Collum, his wife, Lenora, and their children, Jeffrey, age 9, and Anna, age 6, were killed in the Collum trailer home located in the Four Point Heights subdivision, Lafourche Parish, Raceland, Louisiana. All of these individuals had been shot several times, and Jessie Collum had also been stabbed. Two days later on May 29, 1977, Donnie Collum, age 15, and Scotty Collum, age 14, the sons of Jessie Collum by a prior marriage, were stopped by police authorities in Benson, Arizona. Both brothers admitted to the Benson, Arizona authorities that they had taken the automobile without the knowledge or permission of Jessie Collum. As a result, the vehicle was left in Arizona, and the authorities returned Donnie Collum and Scotty Collum to their mother, Mrs. Peggy Mendoza, who lived in Victorville, County of San Bernadino, California.

On Wednesday, June 1, 1977, the bodies of the Collum family were discovered. On this same date the Lafourche Parish Sheriff's Office sent out nationwide bulletins for the location of the Cadillac automobile, and also sought information concerning the whereabouts of Donnie Collum and Scotty Collum. On June 3, 1977, the San Bernadino County Sheriff's Office notified the Lafourche Parish Sheriff's Office of the

location of both Donnie and Scotty Collum. They further advised that the Cadillac automobile was in Benson, Arizona and that both brothers had admitted taking the automobile without the knowledge or permission of Jessie Collum.

At approximately 4:30 p.m. Central time (2:30 p.m. Pacific time), warrants were issued in Lafourche Parish, 17th Judicial District Court, State of Louisiana for the arrest of Donnie Collum and Scotty Collum for the theft of the 1974 Cadillac. The affidavits supporting these warrants were filed into evidence in these proceedings. The information concerning the arrest warrants was telephoned from Lafourche Parish to the San Bernadino County Sheriff's Office. Sergeant Charles Sodaro, Detective Robert Woodrum, and Detective Dennis Searcy responded to this information and proceeded to the trailer park where Donnie and Scotty Collum were then apprehended. Mrs. Peggy Mendoza, the mother of Donnie and Scotty Collum, was present at the time of the arrest. She was advised that they were being taken into custody for Louisiana authorities on the basis of a warrant for auto theft. Detective Woodrum read the *Miranda* warnings to both Donnie and Scotty Collum from a *Miranda* card that he carried on his person. Both brothers advised that they understood their rights. Neither of the two appeared to be under the influence of alcohol or drugs at this time. When they arrived at the Victorville Sheriff's Office sub-station they were placed in separate interview rooms.

At approximately 3:00 p.m. on June 3, 1977, Detective Sodaro and Woodrum interviewed Donnie Collum. During this interview, the petitioner admitted the car theft. He was reminded of his *Miranda* rights a second time and then told that his father had been shot to death. At this time he became very nervous. The interview was therefore terminated at approximately 3:30 p.m.

At approximately 8:00 p.m. on June 3, 1977, Sergeant Sodaro and Detective Woodrum again spoke to Donnie Collum as a result of Donnie's request to speak to them. Prior to this conversation, he was again reminded of his *Miranda* rights, and he indicated that he understood; Donnie Collum consented to talk to the officers. At his request, he was permitted to hear a small portion of the taped statement that Scotty Collum had previously given to the officers. At 8:11 p.m. Donnie Collum commenced a taped statement which was concluded at 8:40 p.m. The taped statements of Donnie Collum have been filed into evidence in these proceedings.

Later that night Major Norman Diaz and Detective Dennis Rodrigue of the Lafourche Parish Sheriff's office arrived in Victorville, California. They proceeded immediately to the detention center where Major Diaz spoke with Mrs. Mendoza. Major Diaz and Detective Rodrigue then proceeded to interview both Donnie and Scotty Collum. These interviews were also taped, and have also been offered into evidence in these proceedings. On July 18, 1977, a Motion to Suppress the taped statements was filed by the petitioner herein, and this matter was heard on August 30, 31, and September 7, 1977. On December 29, 1977, the Motion to Suppress filed by the petitioner was overruled and dismissed. Subsequently, on February 24, 1978, the petitioner, Donnie Collum, entered a plea of guilty to four (4) separate counts of second degree murder. The Court sentenced the petitioner to four (4) consecutive sentences of forty (40) years on each count without the benefit of probation or parole.

REASONS FOR DENYING THE WRIT

I.

WHETHER A JUVENILE CAN KNOWINGLY AND INTELLIGENTLY WAIVE HIS RIGHT TO COUNSEL, AND HIS RIGHT AGAINST SELF-INCRIMINATION, IS A QUESTION OF FACT TO BE DETERMINED BY A REVIEW OF THE "TOTALITY OF CIRCUMSTANCES".

Application of the "totality of circumstances" test requires that the State sustain the burden of affirmatively proving that the waiver of rights by a juvenile was made freely and voluntarily. In making such a determination many factors should be considered: 1) the age of the accused; 2) the education of the accused; 3) the knowledge of the accused as to the charge; 4) whether the accused is held incommunicado; 5) whether the accused was interrogated before formal charges; 6) the method used in the interrogation; and 7) the length of interrogation. All of these factors, and any others, should be considered in determining whether or not a juvenile freely, knowingly, and voluntarily waived his constitutional rights against self-incrimination by giving a confession.

The "totality of circumstances" in the present case shows that Donnie Collum, age 15, was no stranger to police procedure or to police authorities, having had previous juvenile delinquent encounters with the law. On the afternoon of his arrest, Donnie Collum was arrested in his mother's presence and advised of the basis of his arrest. He was advised of his constitutional rights and later reminded approximately four or five times of these rights throughout the custodial interrogations. He was first interrogated after a formal arrest warrant had been issued and after he was advised of the police officers' intentions to question him concerning his father's death.

The initial interrogation of Donnie Collum lasted approximately thirty minutes, from 3:00 to 3:30 p.m. This interrogation ceased when the petitioner became nervous and upset. The second interrogation of Donnie Collum lasted approximately forty (40) minutes. He gave a taped interview at which time he admitted committing the four murders. This second interrogation was at the defendant's request. He also acknowledged that he was advised of his rights continuously throughout the interrogations and that he had requested the second interview.

Petitioner has never claimed that he was beaten or coerced, promised anything as an incentive, or induced to confess.

The tape-recorded interviews were offered into evidence by the State at the motion to suppress hearing. They were heard in their entirety by the trial judge and were also heard by the Louisiana Supreme Court. These statements show a careful, slow and deliberate interview free of any hint of impropriety by the officers and show an unrestricted willingness on the part of the petitioner to disclose even the most minute details of the quadruple murders.

The State of Louisiana suggests that the evidence and the record in this case clearly shows that Donnie Collum, age 15, was well aware of his rights and indeed understood that he was giving a statement concerning his involvement in four homicides. The evidence further shows that both the California and Louisiana authorities were extremely cautious in protecting the constitutional rights of the petitioner. The entire testimony of all of the officers involved stands unimpeached and uncontradicted. The taped statements of Donnie Collum were indeed free and voluntary and were not the result of any outside influences or pressures. *State v. Collum*, 365 So. 2d 1272 (La. 1979), *writ denied*, *Collum v. Louisiana*, 444 U.S. 882 (1979).

II.

THE LOUISIANA SUPREME COURT DECISION OF *STATE OF LOUISIANA IN THE INTEREST OF DINO* SHOULD NOT BE APPLIED RETROACTIVELY. *DINO* IS NO LONGER THE LAW OF LOUISIANA.

On June 15, 1978, the Louisiana Supreme Court announced its decision in *State of Louisiana in the Interest of Dino*, 359 So. 2d 586 (La. 1978), wherein it held that a confession of a juvenile was not admissible in evidence unless the juvenile actually consulted with an attorney or an adult before waiving his right to silence. The quadruple murders for which Donnie and Scotty Collum were arrested occurred on May 27, 1977. Donnie Collum entered guilty pleas on February 24, 1978, approximately four months prior to the *Dino* decision.

The present crime, the present confessions, and the present guilty pleas were entered prior to June 15, 1978, the effective date of the *Dino* decision. The Louisiana Supreme Court held that *Dino* would be given prospective application only and would not apply retroactively. *State v. Collum*, *supra*.

The Louisiana Supreme Court relied upon the prevailing rules on retroactivity established in *Johnson v. New Jersey*, 384 U.S. 719, 86 S. Ct. 1772 (1966). The Louisiana Supreme Court reviewed the three (3) part retroactivity test of *Johnson* and concluded: 1) the integrity of the fact-finding process was not affected by *Dino*; 2) the courts and law enforcement had explicitly and correctly relied upon the "totality of circumstances" test; and 3) the detrimental effect that the retroactivity of *Dino* would have on law enforcement. The Louisiana Supreme Court after careful analysis refused to apply *Dino* retroactively. Collum's convictions were affirmed. The United States Supreme Court denied writs. *Collum v. Louisiana*, *supra*.

It should be noted that the Louisiana Supreme Court on April 14, 1998, rendered a decision in *State v. Fernandez*, 712 So. 2d 485 (La. 1998), which specifically overruled *Dino*. Petitioner requests herein that *Dino* be applied retroactively, when in fact *Dino* is no longer the law in Louisiana.

III.

APPLICATION OF ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT (AEDPA), 28 U.S.C.A. § 2253, *et seq.*, TO PETITIONER'S CLAIMS.

A. Application Of AEDPA To Petitioner's Claim Concerning Voluntary Nature Of Confession.

The relevant portion of the AEDPA, codified at 28 U.S.C. § 2254(d), now provides as follows:

> [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; . . . .

AEDPA requires increased deference that federal courts must give to the prior judgments rendered by the state courts on the merits of a habeas petitioner's claims.

The trial judge's factual findings with respect to the statements given by petitioner to both the California and Louisiana authorities were based not only on the testimony adduced at the suppression hearing, but also upon the Court's review of the audio tape recordings of the statements. These factual determinations are entitled to a presumption of correctness under AEDPA. *Carter v. Johnson*, 110 F.3d 1098, 1108-09 (5th Cir. 1997).

The trial judge's per curiam opinion was issued on December 13, 1977. On February 24, 1978, over two months later, Collum pled guilty to four charges of second degree murder pursuant to a plea agreement with the State. A review of the transcript of the guilty plea proceedings readily demonstrates that petitioner's pleas were knowingly, voluntarily and intelligently entered and therefore pass constitutional muster. During the course of that proceeding, Collum acknowledged understanding that by pleading guilty he was admitting to killing his father, step-mother, half-brother, and half-sister.

On direct appeal, the Louisiana Supreme Court also concluded, after reviewing the suppression hearing testimony and the taped confessions themselves, that Collum's statements were freely and voluntarily given under the "totality of circumstances", the applicable constitutional standard both then and now. The Louisiana Supreme Court also found that the statements were ". . . free of any hint of impropriety by the officers . . ." and reflected ". . . an unrestricted willingness on the part of petitioner to disclose even the most minute details of the offenses," such as the location of the murder weapon. *Collum*, 365 So. 2d at 1278-80.

To overcome the presumption of correctness accorded to the state court's factual findings, Collum must now come

forward with clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Given the state court's factual finding that Collum was advised of his *Miranda* rights several times before confessing and that no promises, threats, force or intimidation were used by authorities, there is no evidence to suggest that the state court's conclusions were clearly erroneous.

B. Application Of AEDPA To Petitioner's Claim Concerning Retroactivity Of *Dino*.

The Louisiana Supreme Court decided the retroactivity issue in *Collum* based on its imminently reasonable, good faith application of United States Supreme Court precedent on the law of retroactivity as it existed at the time. Because *Collum* was not contrary to clearly established federal law, the decision not to apply *Dino* retroactively to the facts of petitioner's case is immune from federal habeas review under 28 U.S.C.A. § 2254(d)(1). *Drinkard v. Johnson*, 97 F.3d 751, 768 (5th Cir. 1996). Petitioner relies on *Griffith v. Kentucky*, 479 U.S. 314 (1987), which was decided nine (9) years after Collum's convictions became final. *Griffith* held that

> a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past.

In 1989, the United States Supreme Court in *Teague v. Lane*, 489 U.S. 288 (1989), concluded that new rules should not be applied retroactively to cases on collateral review and that habeas corpus has always been a collateral remedy. The Court stated: "It is sounder in adjudicating habeas petitions generally

to apply the law prevailing at the time of conviction" rather than to attempt to dispose of habeas cases based on intervening changes in constitutional law. The Fifth Circuit has concluded that "even if *Griffith* established a new rule of constitutional law it should not apply to cases on collateral attack." *Teague* acts as a substantial limitation on the availability of habeas relief by protecting the State's interest in finality. *Wilkerson v. Whitley*, 28 F.3d 498, 506-09 (5th Cir. 1994).

The present application is purely and simply a collateral attack by habeas review. This case should not and does not enjoy the benefit of retroactivity of a new law. Even more compelling is the fact that the "new law" is now no longer the law.

AEDPA permits habeas relief only if the state court decision ". . . was contrary to, or involved an unreasonable application of . . ." clearly established federal law, as announced by the United States Supreme Court. *Carter v. Johnson*, 110 F.3d 1098, 1103 (5th Cir. 1997). This new standard of review, analogized to a "clearly erroneous" standard, precludes federal habeas review of a state court decision if it is one on which reasonable jurists could disagree. *Id.* at 1108 (citing *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1114 (1997), *overruled in part by Lindh v. Murphy*, 117 S. Ct. 2059 (1997)).

> "In effect, a reasonable good faith application of Supreme Court precedent will immunize the state court conviction from federal habeas reversal, even if federal courts later reject that view of the applicable precedent."

Carter, 110 F.3d at 1108 (citing *Mata v. Johnson*, 99 F.3d 1261, 1268 (5th Cir. 1996), *vacated in part on other grounds*, 105

F.3d 209 (5th Cir. 1997)); *Collum v. Cain*, No. 97-1432, U.S. District Court, Eastern District of Louisiana (January 30, 1998).

The *Collum* decision by the Louisiana Supreme Court in 1979 was not contrary to clearly established federal law, nor did that decision involve an unreasonable application of clearly established federal law. Hence, petitioner is not entitled to relief.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Honorable Supreme Court of the United States should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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